EASTLEIGH BOROUGH COUNCIL

Town and Country Planning Act 1990 – Section 78

Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000

SUPPLEMENTARY PROOF OF EVIDENCE

of

MRS LIZ HARRISON BA (HONS) DIP TP MRTPI

Planning appeal against refusal to grant outline planning permission for residential development comprising up to 328 dwellings, public open space and children's play area, land for doctors surgery and associated car parking, with accesses off Bubb Lane and Moorgreen Road, structural planting and landscaping and surface water attenuation and ancillary works, with all matters reserved for future determination.

Land off Bubb Lane, West End, Southampton

Appeal by Gladman Developments Limited

Planning Inspectorate Reference: APP/W1715/W/15/3063753

Eastleigh Borough Council Reference: O/14/75166

MARCH 2016

1.0 INTRODUCTION

1.1 I submitted my main Proof of Evidence to the Inspectorate on 15 March 2016. In it, I made reference to the judgment in ***Cheshire East Borough Council v SSCLG*** [2015] EWHC 410 (Admin) [CD12.3] and the fact that it had been appealed. Two days later, on 17 March 2016, the Court of Appeal gave judgment in the ***Cheshire East*** case (and also in a conjoined appeal) - ***Suffolk Coastal District Council v Hopkins Homes Ltd; Richborough Estates Partnership LLP v Cheshire East Borough Council and another*** [2016] EWCA Civ 168.

1.2 Furthermore, my Proof of Evidence, together with that of Mr. Hemmings, confirmed that since the determination of the application the Council could now demonstrate a 5-year housing land supply, based on a draft objectively assessed housing need figure of 590 dwellings per annum. As Mr Ireland explains, the 590 figure has now (on 16 March 2016) been adopted by the Council's Cabinet as an interim housing requirement. However, since the submission of the Proofs of Evidence some factual inaccuracies have also come to light, as explained in the draft Supplementary Statement of Common Ground and in the corrigendum to Mr. Hemmings' Proof of Evidence. These inaccuracies have reduced the Council's housing land supply to 4.93 years. The Council accepts, therefore, that it cannot demonstrate a five-year supply of deliverable sites for the purposes of paragraphs 47 and 49 of the NPPF, although it is clearly on the cusp of being able to do so.

1.3 This Supplementary Proof of Evidence has therefore been prepared in response to ***Suffolk Coastal & Cheshire East*** judgment given the change in the Council's housing land supply position.

2.0 RELEVANCE OF *SUFFOLK COASTAL & CHESHIRE EAST* JUDGMENT TO THIS APPEAL

2.1 The ***Suffolk Coastal & Cheshire East*** judgment addresses two important matters that have been discussed in a number of recent appeal decisions and

judgments when considering proposals for residential development that breach policies within an extant Development Plan that are principally designed to protect the environment, but in circumstances in which the Local Planning Authority cannot demonstrate a 5-year housing land supply, as is the case with this appeal.

2.1.1 Firstly it addresses whether the policies designed to protect the environment were nonetheless considered to be *"relevant policies for the supply of housing"* within the meaning of paragraph 49 of the NPPF, and therefore out-of-date by virtue of a lack of a 5-year housing land supply.

2.1.2 Secondly it considered whether if such policies were deemed out-of-date, they were therefore to be disapplied in their entirety, as held by Mrs Justice Lang in ***Cheshire East BC v SSCLG*** [2015] EWHC 410 (Admin) [at 62].

2.2 The Court of Appeal held that "relevant policies <u>for</u> the supply of housing" means "relevant policies <u>affecting</u> the supply of housing". This followed a broad interpretation of the phrase stating that *"A "relevant" policy here is simply a policy relevant to the application for planning permission before the decision-maker – relevant either because it is a policy relating specifically to the provision of new housing in the local planning authority's area or because it bears upon the principle of the site in question being developed for housing"* [32]. The Court of Appeal went on to confirm that the interpretation of the phrase is not one that is confined *"merely to policies in the development plan that provide positively for the delivery of new housing in terms of numbers and distribution or the allocation of sites"*, but was one that *"extends to plan policies whose effect is to influence supply of housing land by restricting the locations where new housing may be developed."* The phrase therefore includes a wide range of policies, including *"policies for the general protection of the countryside"* and *"policies whose purpose is to protect the local*

environment in one way or another by preventing or limiting development" [33].

2.3 Following the judgment the Council now accepts that both Policies 1.CO and 2.CO are housing supply policies for the purposes of paragraphs 14 and 49 of the NPPF, and are therefore out-of-date in the absence of a five-year land supply.

2.4 The Court of Appeal also considered what weight should be given to policies (such as Policies 1.CO and 2.CO) that are out-of-date by virtue of paragraph 49 of the NPPF. At [42] the judgment made it clear that the NPPF is a policy document and should not be treated as if it had the force of statute. It does not, and could not, displace the statutory presumption in favour of the development plan and is only a "material consideration" in the context of section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. As such policy statements within the NPPF, including those relating to the "presumption in favour of sustainable development", do not modify the statutory framework for making of decisions on applications, but operate within that framework, as acknowledged within the NPPF, for example, at paragraph 12.

2.5 Given this statutory presumption in favour of the development plan the Court of Appeal therefore held [at 46-48] that, contrary to what Mrs. Justice Lang thought at first instance in the ***Cheshire East*** case at [62], if a policy is out-of-date by reason of a housing shortfall, it is <u>not</u> to be considered "effectively disapplied in its entirety", but can have very considerable (indeed determinative) weight attached to it in certain circumstances:

> *"46. We must emphasize here that the policies in paragraphs 14 and 49 of the NPPF do not make "out-of-date" policies for the supply of housing irrelevant in the determination of a planning application or appeal. Nor do they prescribe how much weight*

should be given to such policies in the decision. Weight is, as ever, a matter for the decision-maker (see the speech of Lord Hoffmann in ***Tesco Stores Ltd. v Secretary of State for the Environment*** *[1995] 1 W.L.R. 759, at p.780F-H). Neither of those paragraphs of the NPPF says that a development plan policy for the supply of housing that is "out-of-date" should be given no weight, or minimal weight, or, indeed, any specific amount of weight. They do not say that such a policy should simply be ignored or disapplied. That idea appears to have found favour in some of the first instance judgments where this question has arisen. It is incorrect.*

47. One may, of course, infer from paragraph 49 of the NPPF that in the Government's view the weight to be given to out-of-date policies for the supply of housing will normally be less than the weight due to policies that provide fully for the requisite supply. The weight to be given to such policies is not dictated by government policy in the NPPF. Nor is it, nor could it be, fixed by the court. It will vary according to the circumstances, including, for example, the extent to which relevant policies fall short of providing for the five-year supply of housing land, the action being taken by the local planning authority to address it, or the particular purpose of a restrictive policy – such as the protection of a "green wedge" or of a gap between settlements. There will be many cases, no doubt, in which restrictive policies, whether general or specific in nature, are given sufficient weight to justify the refusal of planning permission despite their not being up-to-date under the policy in paragraph 49 in the absence of a five-year supply of housing land. Such an outcome is clearly contemplated by government policy in the NPPF. It will always be for the decision-maker to judge, in the particular circumstances of the case in hand, how much weight should be given to conflict with policies for the supply of housing that are out-of-date. This is not a matter of law; it is a matter of planning judgment (see paragraphs 70 to 75 of Lindblom J.'s judgment in

***Crane**, paragraphs 71 and 74 of Lindblom J.'s judgment in **Phides**, and paragraphs 87, 105, 108 and 115 of Holgate J.'s judgment in **Woodcock Holdings Ltd. v Secretary of State for Communities and Local Government and Mid-Sussex District Council** [2015] EWHC 1173 (Admin)).*

*48. The policies in paragraphs 14, 47 and 49 of the NPPF are not, as we understand them, intended to punish a local planning authority when it fails to demonstrate the requisite five-year supply of housing land. They are, however, clearly meant to be an incentive. As Sir David Keene said in paragraph 31 of his judgment in **Hunston**: "… Planning decisions are ones to be arrived at in the public interest, balancing all the relevant factors and are not to be used as some form of sanction on local councils. It is the community which may suffer from a bad decision, not just the local council or its officers."*
(My emphasis added)

2.6 As set out in the Mr Hemmings' Corrigendum, the Council now accepts that the housing land supply has not quite reached the 5-year threshold under paragraph 47 of the NPPF, so that Policies 1.CO and 2.CO are to be deemed out-of-date by virtue of paragraph 49 of the NPPF. The Council confirmed this position before the Inquiry commenced in responding to the draft Supplementary Statement of Common Ground prepared after the ***Suffolk Coastal & Cheshire East*** judgment.

2.7 However, the Council considers that, in the light of the approach set out in the judgment of the Court of Appeal, it is clear that Policies 1.CO and 2.CO must be given substantial weight in any event, even in the absence of a certain five-year supply of housing land. In particular:

2.7.1 Lord Justice Lindblom confirmed that there will be many cases in which restrictive policies are to be given sufficient weight to justify the refusal

of planning permission, despite not being up-to-date in the absence of a five-year supply of housing land.

2.7.2 He also set out that the weight to be given to such policies is not fixed and will vary according to circumstances. He went on to provide three examples of the considerations relevant to the attribution of weight in this regard, all three of which are relevant to this appeal:

(i) The extent to which the Council falls short of providing for the five-year supply of housing – as outlined above this is now small.

(ii) The action which has been taken by the Council to address that shortfall – as set out in my Proof of Evidence and those of Cllr House and Mr Hemmings, this has been considerable and effective with planning permission being granted for major residential schemes totalling 2,417 units since January 2014 and with a further 1,629 units approved subject to completion of a S106 Planning Obligation.

(iii) The particular purpose of the restrictive policy, such as a green wedge or a gap between settlements – the specific purpose of Policy 2.CO is to protect a gap between settlements. As this was one of the specific examples given by Lord Justice Lindblom it can only be inferred that this is the type of policy to which he considers that determinative weight can, properly, be given as a matter of planning judgment, even if there is a housing shortfall.

2.8 Furthermore, given that Lord Justice Lindblom specifically cited gap policies not only in the context of considering when out-of-date policies might properly found a reason for refusal, but also in the context of paragraph 14 of the NPPF (which makes provision for how to apply the “presumption in favour of sustainable development”), it should be noted that in an earlier judgment of Mr

Justice Lindblom (as he then was), in ***Bloor Homes East Midland v SSCLG [2014] EWHC 754 (Admin),*** he held as follows at [179]:

> *"On any sensible view, if the development would harm the Green Wedge by damaging its character and appearance or its function in separating … villages … or by spoiling its amenity for people walking on public footpaths nearby, it would not be sustainable development within the wide scope drawn for that concept in paragraphs 18-219 of the NPPF."*

2.9 This confirms that development which harms a gap can, as a matter of planning judgment, be unsustainable for that reason alone. That is important because it follows from the fact that there is only a presumption in favour of sustainable development, then there is no such presumption in favour of unsustainable development. That was decided in ***William Davis v SSCLG*** [2013] EWHC 3058 (Admin), in which Mrs Justice Lang held at [37] that "*it would be contrary to the fundamental principles of the NPPF if the presumption…applied equally to sustainable and non-sustainable development".*

2.10 It is acknowledged that another recent judgment ***Cheshire East BC v SSCLG*** [2016] EWHC 571 (Admin) reached another conclusion, stating at [23] *"In my judgment, this is not, and cannot be, a question of assessing whether the proposal amounts to sustainable development before applying the presumption within paragraph 14. This is not what paragraph 14 says, and in my view would be unworkable. Rather, paragraph 14 teaches decision makers how to decide whether the proposal, if approved, would constitute sustainable development."*

2.11 There is, therefore, an unresolved conflict in authority in the High Court as to whether it is appropriate to assess whether the proposal amounts to sustainable development before applying the presumption within paragraph 14 or whether to judge the issue simply by applying paragraph 14 and its

footnotes. However, the basic points that paragraph 14 does not provide support for unsustainable development and that development may be unsustainable because of the harm it causes to a gap are not controversial.

3.0 CONCLUSION

3.1 In light of the above, particularly the three examples given by Lord Justice Lindblom at [47] of the ***Suffolk Coastal & Cheshire East***, and the fact that Policies 1.CO and 2.CO are consistent with the NPPF (as set out in my main Proof of Evidence) it is the Council's position that very significant weight can still be given to Policies 1.CO and 2.CO. As such the conclusions reached in my main Proof of Evidence with respect to the planning balance remain – the proposal is in clear breach of the Development Plan, it is harmful in its impacts, and the adverse impacts of the proposal do significantly and demonstrably outweigh the benefits when assessed against the policies of the NPPF taken as a whole. Following the Court of Appeal's judgment, I therefore strongly consider that permission should be refused.